



FILE COPY

Office - Supreme Court, U. S.  
FILED

SEP 14 1939

CHARLES ELMORE GROPLEY  
CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1939.

**No. 19**

OKLAHOMA PACKING COMPANY, FORMERLY WILSON  
& CO., INC. OF OKLAHOMA, AN OKLAHOMA CORPORA-  
TION, AND WILSON & CO., INC. OF OKLAHOMA, A  
DELAWARE CORPORATION,

*Petitioners,*

*vs.*

OKLAHOMA GAS AND ELECTRIC COMPANY, A COR-  
PORATION; OKLAHOMA NATURAL GAS COMPANY,  
A CORPORATION; W. A. PHILLIPS, JR., H. J. CRAW-  
FORD, J. V. RITTS, LEONARD C. RITTS, R. W.  
HANNAN, A. W. LEONARD, AND R. C. SHARP, THE  
DIRECTORS OF OKLAHOMA NATURAL GAS COMPANY, A  
DISSOLVED CORPORATION; AND OKLAHOMA NATURAL  
GAS CORPORATION,

*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT  
OF APPEALS FOR THE TENTH CIRCUIT.

**BRIEF FOR PETITIONERS.**

W. R. BROWN,  
PAUL WARE,

*Counsel for Petitioners.*



## INDEX.

---

	PAGE
Opinions Below .....	1
Jurisdiction .....	2
Statement .....	3
Specification of Errors to be Urged.....	7
Summary of Argument.....	8
Argument .....	10
I. The decision of the Supreme Court of Oklahoma affirming Order No. 3388 of the Corporation Commission was judicial and is <i>res judicata</i> of all the issues in the instant case.....	10
II. The District Court was prohibited by Section 265, Judicial Code, from enjoining the prosecu- tion of the action in the State Court.....	14
III. Venue .....	16
Appendix .....	19

## TABLE OF CASES.

City of Pawhuska v. Pawhuska Oil & Gas Co., 250 U. S. 394; 64 Okla. 214.....	14
City of Sapulpa v. Oklahoma Natural Gas Co., 258 U. S. 608; 79 Okla. 196.....	14
Federal Radio Comm. v. Nelson Bros. Bond & Mortgage Co., 289 U. S. 266.....	13
Grubb v. Public Utilities Comm. of Ohio, 281 U. S. 470.....	8, 14
Hill v. Martin, 296 U. S. 393.....	16
In re Keasbey & Mattison Co., 160 U. S. 221.....	16
Kohn v. Central Distributing Co., 306 U. S. 531.....	15
McLean v. State of Mississippi, 96 F. (2d) 741; cert. den. 305 U. S. 623.....	18
Messenger v. Anderson, 225 U. S. 436.....	12
Neirbo Company et al. v. Bethlehem Shipbuilding Corporation, Ltd., 103 F. (2d) 765.....	18
Oklahoma Cotton Ginners' Ass'n v. State, 174 Okla. 243.....	5, 6, 11, 12, 13
Oklahoma Gas & Electric Co. v. Oklahoma Packing Co., 6 F. Supp. 893.....	5, 15
Oklahoma Gas & Electric Co. v. Oklahoma Packing Co., 292 U. S. 386.....	6
Oklahoma Gas & Electric Co. v. Wilson & Co., Inc., 54 F. (2d) 596.....	5, 6, 7, 11, 12
Oklahoma Gas & Electric Co. v. Wilson & Co., Inc., 146 Okla. 272.....	4, 6, 8, 10, 11, 12, 13
Oklahoma Gas & Electric Co. v. Wilson & Co., Inc., 178 Okla. 604.....	6, 8, 11, 12
Oklahoma Natural Gas Co. v. State, 258 U. S. 234; 78 Okla. 5.....	11, 14

Oklahoma Natural Gas Co. v. State, 274 U. S. 721; 110 Okla. 297 .....	14
Oklahoma Packing Co. et al. v. Oklahoma Gas & Electric Co., et al., 100 F. (2d) 770.....	1
Prentis v. Atlantic Coast Line Co., 211 U. S. 210.....	12
St. Louis & S. F. R. Co. v. Quinette, 251 Fed. 773.....	12
Southern Pacific Co. v. Denton, 146 U. S. 202.....	17
Steelman v. All Continent Co., 301 U. S. 278.....	15

#### CONSTITUTIONS AND STATUTES CITED.

##### Oklahoma:

Sec. 43, Art. IX of Constitution (2 Okl. Stats. 1931, p. 1474, § 13628) .....	19
Sec. 130, Okla. Statutes 1931 (1 Okl. Stats. 1931, p. 50) .....	19

##### United States:

Sec. 51, Judicial Code.....	9, 16
Sec. 240, Judicial Code as amended Act Feb. 13, 1925 .....	2
Sec. 265, Judicial Code.....	5, 7, 8, 15, 16
Fourteenth Amendment to Constitution.....	13





IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1939.

---

No. 19.

---

OKLAHOMA PACKING COMPANY, FORMERLY WILSON  
& CO., INC. OF OKLAHOMA, AN OKLAHOMA CORPORATION,  
AND WILSON & CO., INC. OF OKLAHOMA, A  
DELAWARE CORPORATION,

*Petitioners,*

*vs.*

OKLAHOMA GAS AND ELECTRIC COMPANY, A CORPORATION;  
OKLAHOMA NATURAL GAS COMPANY, A CORPORATION;  
W. T. PHILLIPS, JR., H. J. CRAWFORD, J. V. RITTS,  
LEONARD C. RITTS, R. W. HANNAN, A. W. LEONARD,  
AND R. C. SHARP, THE DIRECTORS OF OKLAHOMA  
NATURAL GAS COMPANY, A DISSOLVED CORPORATION;  
AND OKLAHOMA NATURAL GAS CORPORATION,

*Respondents.*

---

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT  
OF APPEALS FOR THE TENTH CIRCUIT.

---

**BRIEF FOR PETITIONERS.**

---

**OPINIONS BELOW.**

---

The opinion of the Tenth Circuit Court of Appeals appears in the record (R. 201) and in the reports, 100 F. (2d) 770. The opinion of the District Court appears only in the record (R. 97).



## JURISDICTION.

---

The date of the decision and judgment of the Circuit Court of Appeals for the Tenth Circuit is December 19, 1938 (R. 212). Petition for certiorari was filed in this Court March 15, 1939, and was granted April 17, 1939 (R. 213).

The jurisdiction of the Court is invoked under Section 240 (a) of the Judicial Code as amended by an Act of February 13, 1925.

## STATEMENT.

---

An order of the Oklahoma Corporation Commission, affirmed by the Supreme Court of the State of Oklahoma, directing Oklahoma Natural Gas Company, a public utility, to serve fuel gas to Wilson and Company, an industrial consumer, at its voluntary and previously published rate, has been held invalid by a decree of the United States District Court, which enjoined the enforcement of that order, and also an action at law in the Oklahoma court to recover the overcharges collected subsequent to the date of the Commission's order. This decree was affirmed by the Tenth Circuit Court of Appeals, and is in direct conflict with the law of the State of Oklahoma as previously determined by its Supreme Court, and, in effect, constitutes an assumption of appellate jurisdiction by the Federal district court to review a judgment of the Supreme Court of Oklahoma.

A further matter involved is the objection to the venue of the District Court over petitioner, the Delaware corporation, which promptly appeared specially and objected upon the ground that, in this suit, which is based upon a

federal question, it could not be sued in the district in which it was not an inhabitant (R. 38). The Circuit Court of Appeals affirmed (R. 212, 208) the judgment of the District Court overruling the objection (R. 58, 64, 117).

The controversy between the parties commenced with the complaint of Wilson and Company. (R. 12) against Oklahoma Natural Gas Company and Oklahoma Gas & Electric Company, public utilities, before the Corporation Commission of Oklahoma, wherein Wilson and Company charged that it operated a packing plant outside of the city limits of Oklahoma City and about 450 feet from the pipe line of the general system of Oklahoma Natural; and that because of an agreement between the two utility companies, it was compelled to pay Oklahoma Gas & Electric Company a rate five cents in excess of that charged by Oklahoma Natural to other industries similarly situated. After full hearing of the evidence, the Commission made its findings of fact (R. 16-24), one of which was that the Oklahoma Natural Gas Company, under the circumstances, should be required to supply the Wilson plant with similar quantities of gas to that supplied other institutions located along its pipe line outside of incorporated cities upon the same terms and conditions (R. 24). The Commission, on April 13, 1926, entered its Order No. 3388 requiring that utility company to serve Wilson and Company with fuel gas at its industrial rate (R. 24-25).

That rate was not and is not in dispute since it had been previously and voluntarily adopted by the Oklahoma Natural for industrial users located on its general system outside of the city limits (R. 24, 90, 121-122, 133, 134).

Pending appeal from the Corporation Commission to the Supreme Court of Oklahoma, Order No. 3388 was superseded by respondent filing supersedeas bonds conditioned to refund to the Wilson Company five cents per thousand

cubic feet if the order was affirmed by the Supreme Court of Oklahoma (R. 127-128, Exs. H, I and J; set out in full R. 51-56).

Upon appeal from the Commission's Order No. 3388 to the Supreme Court of Oklahoma, the Oklahoma Natural and the Oklahoma Gas and Electric Companies challenged the validity of that order on the grounds that it was not supported by the evidence, was contrary to law, and a taking of property without due process of law. The Oklahoma Supreme Court, on April 29, 1930, affirmed the order and specifically disposed of each of these contentions. *Oklahoma Gas & Electric Co. v. Wilson & Co., Inc.*, 146 Okla. 272. The utility companies failed to take an appeal from that decision to the United States Supreme Court.

The same gas companies, on May 20, 1932, filed the present bill (R. 1) in the United States District Court and assailed the validity of Order No. 3388, as affirmed by the Oklahoma Supreme Court, upon the same grounds urged by them in the State Supreme Court (R. 7-8) and sought to enjoin the Wilson companies and state officers from in any way enforcing that order. The utility companies further alleged that the Commission's order and its affirmation by the Supreme Court of Oklahoma were legislative (R. 6, par. VI). The Wilson companies denied these allegations (R. 43, par. 14) and affirmatively answered that the adjudication of the issues before the Corporation Commission and upon appeal to the Supreme Court of Oklahoma was judicial and *res judicata* of all issues in this suit and that the Federal District Court had no jurisdiction to review that judgment (R. 51, pars. 9 and p. R. 64).

The bill further sought to enjoin (R. 8-9) an action at law previously filed on December 3, 1931, in the State Court by Wilson & Co., Inc., against the Oklahoma Gas &

Electric Company and its surety upon said supersedeas bonds to recover the excess charges paid that company for gas (R. 26-35). The Wilson company's further position as to this part of the bill was that, under section 265, Judicial Code, the *in personam* action (R. 77; 6 F. Supp. 893, 895) in the State Court was not within any exceptions to that section and could not be enjoined by a Federal District Court (R. 48-49, par. 22 (d) and (f); R. 116, par. 15; R. 117, 186).

The Circuit Court of Appeals has affirmed (R. 212) the judgment and decree of the District Court which declared invalid, on the grounds alleged, the Commission's Order No. 3388 as affirmed by the Supreme Court of Oklahoma (R. 96), and enjoined the further prosecution of the action in the State Court (R. 109-110). An injunction against state officers was denied.

In holding that Order null and void the Tenth Circuit Court of Appeals (R. 208) and the District Court (R. 96, 104) followed language in a former opinion of that Court of Appeals (*Oklahoma Gas & Electric Company v. Wilson & Co., Inc.*, 54 F. (2d) 596), wherein it stated that the Supreme Court of Oklahoma acted legislatively only, in reviewing orders of the Oklahoma Corporation Commission. The language in that opinion has been expressly held to be an incorrect statement of the law of Oklahoma by the Supreme Court of that State in *Oklahoma Cotton Ginners' Ass'n. v. State*, 174 Okla. 243, at p. 251.

The settled law of Oklahoma as announced in the *Ginners'* case is that decisions of the Supreme Court of Oklahoma on appeals from orders of the Corporation Commission affecting public utilities, other than "transportation and transmission companies," constitute a judicial determination of the questions involved. Upon appeal, from a judgment (R. 135) in favor of Wilson & Co., Inc.,

in said action at law in the State Court, the Supreme Court of Oklahoma followed its decision in the *Ginnery* case, *supra*, and specifically held that its affirmance of Order No. 3388 (in 146 Okla. 272) had been a judicial determination of the validity of that order. *Oklahoma Gas & Electric Co. v. Wilson & Co., Inc.*, 178 Okla. 604, at p. 605.

The prior suit, the opinion in which is reported in 54 F. (2d) 596, was similar to the present one (R. 183, Ex. 8) and the Tenth Circuit Court of Appeals reversed a decree of the District Court dismissing the bill. Upon remand, a three judge court was convened which held that such a court was without jurisdiction. The bill was thereafter dismissed without prejudice (R. 97) and the present suit filed.

The present case has been before this Court on an appeal from the District Court, three judges sitting, and the only question decided was that a three judge court had no jurisdiction. *Oklahoma Gas & Electric Co. v. Oklahoma Packing Co.*, 292 U. S. 386.



## SPECIFICATION OF ERRORS TO BE URGED.

The Court below erred:

1. In refusing to hold that the adjudication of Order No. 3388 by the Corporation Commission and the review and affirmance thereof by the Supreme Court of Oklahoma was, under the laws of Oklahoma, a judicial determination of the validity of the order and *res judicata* of all the issues in the present suit.

2. In refusing to be bound by the decisions of the Supreme Court of Oklahoma, the highest court of that State, construing its Constitution and Laws relating to the character of the functions exercised by that court, in reviewing orders of the Corporation Commission affecting public utilities;

(a) And, incidentally, in following an earlier decision of the Tenth Circuit Court of Appeals (54 F. (2d) 596) which was, at the time the lower courts acted in the present case, in direct conflict with decisions of the Supreme Court of Oklahoma announcing the correct construction of its Constitution and Laws.

3. In granting an injunction, in contravention of section 265, Judicial Code, against the further prosecution of the *in personam* action at law in the State Court to recover the overcharges collected by the Oklahoma Gas & Electric Company from Wilson & Co.

4. In holding that the United States District Court, Western District of Oklahoma, had venue, in this civil suit based on a federal question, over petitioner, a Delaware corporation, qualified to do business in Oklahoma, with a usual place of business in that district, petitioner having appeared specially and objected to being sued in that district on the ground that it was not an inhabitant thereof, which objection has never been waived.



## SUMMARY OF ARGUMENT,

Order No. 3388 of the Corporation Commission of Oklahoma directing the gas company to serve an industrial consumer at its voluntary and previously published rate merely ordered the utility company to cease its discrimination and perform public service which was its clear legal duty so to do.

Upon their appeal from that order to the Supreme Court of Oklahoma, the sole questions raised were that the order was not supported by the evidence and contrary to law and that it was a taking of property without due process of law, which were appropriate ones for judicial decision, and the affirmance thereof was a judicial determination of Order No. 3388. *Oklahoma Gas & Electric Co. v. Wilson & Co., Inc.*, 146 Okla. 272. In a subsequent decision by that Court it was expressly held that the prior decision was a judicial determination of the order. *Oklahoma Gas & Electric Co. v. Wilson & Co., Inc.*, 178 Okla. 604.

The decision of the State Supreme Court that it acted judicially on appeals from the Corporation Commission is a construction of state laws and should be followed by the Federal courts. The parties and the issues raised in the above appeal are the same as in the present suit and the judgment of the Supreme Court of Oklahoma is *res judicata* in this suit. *Grubb v. Public Utilities Comm. of Ohio*, 281 U. S. 470.

The injunction staying the prosecution of the action at law in the State Court upon the supersedeas bonds and to recover the excess charges made for gas is prohibited by Section 265, Judicial Code.

A statute of Oklahoma cannot be construed to amend the Federal venue statute (Section 51, Judicial code), and neither can compliance thereunder be construed as a waiver of the privilege of petitioner, the Delaware corporation, to be sued in the Federal courts in the State of Delaware, where it is an inhabitant.

## ARGUMENT.

## I.

THE DECISION OF THE SUPREME COURT OF OKLAHOMA AFFIRMING ORDER NO. 3388 OF THE CORPORATION COMMISSION WAS JUDICIAL AND IS RES JUDICATA OF ALL THE ISSUES IN THE INSTANT CASE.

The parties and the issues in this suit are the same as those in the proceedings heard and determined by the Corporation Commission (R. 16-25) and, also, the same as those before the Supreme Court of Oklahoma in the appeal from Order No. 3388 and decided by it in affirming that order. *Oklahoma Gas & Electric Co. v. Wilson & Co., Inc.*, 146 Okla. 272. That Court, among other things, held that the order was not contrary to law and was not a taking of property without due process of law.

The gas companies made the same contentions in the case at bar and urged that the Oklahoma Supreme Court acted in a legislative capacity in affirming the order. Wilson and Company contended that the highest court of the State did not act legislatively in this appeal, but functioned in its judicial capacity and its decision was *res judicata* of all the issues in the present suit.

In considering whether the Supreme Court of Oklahoma functions legislatively or judicially in reviewing orders of the Corporation Commission, the distinction between orders affecting "transportation and transmission companies" and those affecting "public utilities", such as gas companies, must be kept clear.

Where the order affects a "transportation and transmission company" the Supreme Court of Oklahoma, un-

der the State Constitution, may review the Commission's orders legislatively in that it may enter the order which the Commission should have entered.

Where the order affects "*public utilities*," such as "ginners" and "gas companies," (which are not included within the constitutional definition of "transportation and transmission companies"), that Court reviews such orders judicially only and may not enter an order which the Commission should have entered.<sup>1</sup>

This distinction was clearly pointed out by the Supreme Court of Oklahoma in reviewing an order of the Corporation Commission affecting ginners. That Court reviewed carefully the decisions, the constitutional and statutory provisions of the State, and held that it reviews orders affecting public utilities, other than "transportation and transmission companies," judicially only. *Oklahoma Cotton Ginners' Assn. v. State*, 174 Okla. 243.

The reasoning and the rule announced in the *Ginners'* case was followed by that Court in the appeal in the law action on the supersedeas bonds and it was held that it had previously reviewed Order No. 3388 (146 Okla. 272) judicially. *Oklahoma Gas & Electric Co. v. Wilson & Co., Inc.*, 178 Okla. 604 at p. 605.

The above decisions were completely disregarded by the Circuit Court of Appeals and the District Court. They relied upon the opinion of the Tenth Circuit Court of Appeals in *Oklahoma Gas & Electric Co. v. Wilson & Co., Inc.*, 54 F. (2d) 596, even though the State Supreme Court in the *Ginners'* case, 174 Okla. at page 251, had<sup>2</sup> specifically held that the statement as to how the Su-

1. Jurisdiction of the Corporation Commission over "gas companies" was conferred by the legislature in Chap. 93, Sess. Laws of Okla. 1913, sections 1-5 (Okla. Stats. 1931, Secs. 3617-3621) and not by Article IX of the Oklahoma Constitution. *Oklahoma Natural Gas Co. v. State*, 78 Okla. 5 at p. 7.

preme Court of Oklahoma reviewed orders of the Corporation Commission affecting public utilities, appearing in 54 F. (2d) 596, was not a correct statement of the law of Oklahoma.

The decisions in the *Gimmers'* case and the second *Wilson* case (178 Okla. 604) were subsequent to the decision by the Tenth Circuit Court of Appeals in 54 F. (2d) 596. They expressed the law of the State of Oklahoma at the time the case at bar was before the District Court and the Circuit Court of Appeals. The federal courts should have followed the construction given the Constitution and statutes of the State of Oklahoma by the Supreme Court of that State, even though the Circuit Court of Appeals had previously held to the contrary. *Messenger v. Anderson*, 225 U. S. 436; *St. Louis & S. F. R. Co. v. Quinette* (Okla. C. C. A. 8th), 251 Fed. 773.

When the Supreme Court of Oklahoma affirmed Order No. 3388 it judicially determined the validity of that order. (*Oklahoma Gas & Electric Co. v. Wilson & Co., Inc.*, 146 Okla. 272.) A brief reference to the original proceedings before the Corporation Commission and the review of its order by the Supreme Court of Oklahoma will show convincingly that it was judicial.

The Corporation Commission is a tribunal wherein the gas companies could and did present all the evidence touching their rights. When the Commission found *Wilson & Company* was being charged a rate in excess of the previously established rate for industrial consumers similarly situated, it fully investigated and declared the liability of the gas company on present or past facts and under the laws then existing. No new rate was established for the future. *Prentis v. Atlantic Coast Line Co.*, 211 U. S. 210, at p. 226. It merely ordered the gas company to cease its discrimination. *Oklahoma Gas & Elec-*



*tric Co. v. Wilson & Co., Inc.*, 146 Okla. 272, at pp. 281, 282-283.

The only questions raised by the gas companies, in their appeal from that order to the Supreme Court of Oklahoma, were that the order was not supported by the evidence and contrary to the law, and the order violated the Constitution of Oklahoma and the Fourteenth Amendment to the Constitution of the United States. The State Supreme Court decided, after a careful study of the evidence and findings of fact by the Commission, that the evidence was sufficient to sustain the findings and to warrant the Commission in making the order. The Supreme Court then held that the order was not contrary to law, and that the gas companies were not denied due process of law. *Oklahoma Gas & Electric Co. v. Wilson & Co., Inc.*, 146 Okla. 272.

The Supreme Court of Oklahoma was reviewing the record made before the Commission as finally presented on appeal. The questions called for a purely legal determination. That Court was not making any legislative finding or order, such as rates for the future. It merely reviewed and affirmed an order of the Commission commanding a public utility to render or perform public service such as was its clearly legal duty to perform. The questions raised clearly show that they were appropriate ones for judicial decision within the rule announced in the *Ginners* case, 174 Okla. at pp. 251-252, and *Federal Radio Comm. v. Nelson Bros. Bond & Mortgage Co.*, 289 U. S. 266, at pp. 275-277.

The District Court of the United States was without power or authority to thus review and reverse the decision of the Supreme Court of Oklahoma. This Honorable Court is the only tribunal that would have had such jurisdiction, and then only upon application made directly from



the State Supreme Court. This has long been the understood and well established procedure in such cases.<sup>1</sup>

The judgment of the Supreme Court of Oklahoma upon the merits in that proceeding is *res judicata* of all issues raised in the case at bar. *Grubb v. Public Utilities Comm. of Ohio*, 281 U.S. 470.

## II.

THE DISTRICT COURT WAS PROHIBITED BY SECTION 265, JUDICIAL CODE, FROM ENJOINING THE PROSECUTION OF THE ACTION IN THE STATE COURT.

The Tenth Circuit Court of Appeals has affirmed a decree of the District Court of Oklahoma permanently enjoining the Wilson companies, their officers, agents, and attorneys from further prosecuting a certain action at law brought by Wilson & Co., Inc., of Oklahoma, a Delaware corporation, against Oklahoma Gas & Electric Co., and its surety, Fidelity & Casualty Company of New York.

The petition in the State Court (R. 26-35) shows that this was an *in personam* action to recover money damages. The first three counts are for breaches of supersedeas bonds which were filed in the Supreme Court of Oklahoma to supersede Order No. 3388 pending the appeal

1. The following cases involved orders of the Corporation Commission affecting gas companies which had been reviewed by the Supreme Court of Oklahoma and review was either had or applied for in this Court:

*Oklahoma Natural Gas Co. v. State*, 258 U. S. 234; a review of 78 Okla. 5.

*Oklahoma Natural Gas Co. v. State*, 274 U. S. 721; denying writ of certiorari to review 110 Okla. 297.

*City of Pawhuska v. Pawhuska Oil & Gas Co.*, 250 U. S. 394; a review of 64 Okla. 214.

*City of Sapulpa v. Oklahoma Natural Gas Co.*, 258 U. S. 608, dismissing writ of error from 79 Okla. 196.

to that court. The amounts of those bonds cover the excess rate collected by the Oklahoma Gas & Electric Co. subsequent to the date of the Commission's order. The fourth cause of action is to recover the amounts paid for gas in excess of the lawful rate which is not covered by bonds set up in the three preceding counts.

The suit in the State Court was commenced about six months before the present injunction suit was filed in the Federal District Court. It has been held by the three judge district court in this suit that the action in the State Court, as well as in the Federal Court, were *in personam* actions and that the only thing sought to be accomplished in this equitable action was to enjoin the further prosecution of that action at law in the State Court. (R. 77; *Oklahoma Gas & Electric Co. v. Oklahoma Packing Co.*, 6 F. Supp. 893.) It will be recalled that the request in this suit for an injunction against state officers was refused.

Section 265 of the Judicial Code prohibits the Federal District Court from enjoining the action at law in the State Court. It provides:

"The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

This Court has applied that section to similar situations repeatedly from the time of its enactment to the current decision in *Kohn v. Central Distributing Co.*, 306 U. S. 531.

The Tenth Circuit Court of Appeals, however, has held that this section does not apply, for the reason that the injunction is against the parties and not against the State Court, citing *Steelman v. All Continent Co.*, 301 U. S. 278. The *Steelman* case is not applicable for the reason that it involved a proceeding in bankruptcy, which is specifically

excepted in Section 265, and further that section was not under consideration.

Under Section 265, as construed by this Court, an injunction against the parties to a proceeding in a state court is the same as a stay of proceedings in that court. *Hill v. Martin*, 296 U. S. 393. Since the action at law in the Oklahoma Court was not a case within one of the recognized exceptions to Section 265, it was error for the Tenth Circuit Court of Appeals to have affirmed the decree of the District Court enjoining the further prosecution of that action.

### III.

#### VENUE.

The venue objection of petitioner, the Delaware corporation, was made under Section 51, Judicial Code, which provides:

"... no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

Since jurisdiction of the present suit is founded on a federal question, the first part of the statute applies. It is settled, however, that the reasoning in cases based on the latter part of the statute, which deals with diversity of citizenship, is equally applicable to suits arising under the Constitution, laws, or treaties of the United States; the only difference being that, where suit is founded on a federal question, it must be brought in the district of which the defendant is an inhabitant. *In re Keasbey & Mattison Co.*, 160 U. S. 221.

The company appeared specially and objected to the venue on the ground that it was an inhabitant of Delaware. The objection was overruled and exception taken and again preserved in its answer (R. 64).

The only reason given for overruling the objection was that the company had previously consented to be sued in Oklahoma county by filing with the Secretary of State an appointment of an agent (R. 182, Ex. 7) which was mandatory under the laws of Oklahoma (See Appendix) before a foreign corporation could do business in that state. The particular clause in the appointment upon which the Circuit Court of Appeals relied is as follows:

"Said company consents that all actions against it may be brought in the county in which the cause of action arose, as now provided by law." (R. 182.)

This clause has no application to this suit in the Federal Court for several reasons.

In the first place, the above clause applies only to actions in the State Court. To construe the statutes of Oklahoma so as to compel the foreign corporation to surrender a right and privilege secured to it by the Constitution and laws of the United States would render the state law unconstitutional and void. The ruling of the Tenth Circuit Court of Appeals is in direct conflict with the decision of this Court in *Southern Pacific Co. v. Denton*, 146 U. S. 202.

In the second place, the appointment of the agent was filed December 12, 1932 (R. 183), or six months after this suit was filed on May 20, 1932 (R. 1).

Since certiorari was granted in the present case the Second Circuit Court of Appeals refused to follow the decision of the Tenth Circuit Court of Appeals in this case and was not convinced of the soundness of the distinction attempted to be made as a result of the clause in the above

appointment of an agent. *Neirbo Company et al. v. Bethlehem Shipbuilding Corporation, Ltd.*, 103 F. (2d) 765.<sup>1</sup> That decision and one by the Fifth Circuit Court of Appeals in *McLean v. State of Mississippi*, 96 F. (2d) 741, certiorari denied 305 U. S. 623, contain a careful analysis of the authorities and consider and dispose of the various objections offered against the ruling in the *Denton* case.

Under the existing law it was error for the Tenth Circuit Court of Appeals to affirm a decree of the District Court denying the petitioner, a Delaware corporation, its privilege not to be sued in the Western District of Oklahoma.

Respectfully submitted,

W. R. BROWN,

PAUL WARE,

*Counsel for Petitioners.*

## APPENDIX.

Section 43 of Article IX of the Constitution of Oklahoma is as follows:

"No corporation, foreign or domestic, shall be permitted to do business in this State without first filing in the office of the Corporation Commission a list of its stockholders, officers, and directors, with the residence and post office address of, and the amount of stock held by each. And every foreign corporation shall, before being licensed to do business in the State, designate an agent residing in the State; and service of summons or legal notice may be had on such designated agent and such other agents as now are or may hereafter be provided for by law. Suit may be maintained against a foreign corporation in the county where an agent of such corporation may be found, or in the county of the residence of plaintiff, or in the county where the cause of action may arise." (2 Okl. Stats. 1931, p. 1474, § 13628.)

Section 130, Oklahoma Statutes 1931, provides:

"Every foreign corporation shall, before it shall be authorized or permitted to transact business in this State or continue business therein, if already established, by its certificate under the hand of the president and seal of the company, appoint an agent who shall be a citizen of the State and reside at the state capitol, upon whom service of process may be made in an action in which said corporation shall be a party; and action may be brought in any county in which the cause of action arose, as now provided by law. Service upon said agent shall be taken and held as due service upon said corporation; and such certificate shall also state the principal place of business of such corporation in this State, with the address of the resident agent." (1 Okl. Stats. 1931, p. 50.)